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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. [redacted] 47

SARAH ENELOW, Petitioner (Appellant Below),

v.

NEW YORK LIFE INSURANCE COMPANY, Respondent (Appellee Below).

REPLY BRIEF ON BEHALF OF PETITIONER.

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Reply Brief on Behalf of Petitioner.

Respondent, while saying it "does not oppose the granting of a writ of certiorari" gives two reasons why the decision of the Court below should be sustained.

1. Respondent says (Mem. for Resp. 4): "There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the other party had knowledge of the falsity of his statements when he made them: in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief" (citing cases).

There are two answers to this contention. In the first place, the policy provides (R. 13):

> "The policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is indorsed upon or attached to this Policy when issued."

Recognizing the effect of the above provision and that because thereof the respondent has to prove "knowledge of the falsity" of the answers, respondent pleads such knowledge as follows (R. 31):

> "15. Said answers were made by Max Enelow with knowledge of their falsity and fraudulently for the purpose of procuring said insurance."

It is not necessary to cite cases to establish the proposition that a party must prove his case, as pleaded. In view, therefore, of the contract and the charge in the affidavit of defense, it would seem to be misleading to argue that respondent has no adequate remedy at law in pleading as a defense, in the law suit, the alleged answers claimed to have been *knowingly and fraudulently* made and that only a court of equity can give it adequate relief because in equity it can win its case by merely showing that the answers were material and untrue and without proof that they were made knowingly and with fraudulent intent. Surely they cannot mean that because they were able to get the order of Court that this case be tried by a chancellor according to equitable procedure, they have somehow gotten the issues made up by the pleadings changed in some manner, so that they do not have to prove all of the facts which they set out as their defense in the affidavit of defense.

In the next place, it is difficult to conceive of such a strange animal as an innocent fraud,—a fraud perpetrated without knowledge of the falsity of the fraudulent representation. If a man makes false statements, recklessly, and without any reasonable basis, he can be held to the same consequences as a man who makes false statements knowingly. He *is* a fraud for he is impliedly representing that he *knows* the facts with reference to certain matters when he does not. It is true that in the case of Smith vs. Richards, 38 U. S. 26, which was a bill to rescind a contract for the purchase of a gold mine because of fraudulent representations, the Court said that even

though the appellant made the representations under the influence of delusion, it is sufficient for the decision of *that* case if it be established that the representation was untrue in material parts of it. But the Court, in Southern Development Company vs. Silva, 125 U. S. 247, where it dismissed a similar bill, stated that one of the elements necessary to be established was that the alleged false representation was not actually believed by the defendant, on reasonable grounds, to be true.

What this Court said in the Smith-Richards case, *supra,* on the subject of fraud applies as well in a case at law:

> "Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what one does not know, or believes to be true, is equally, in morals and *law,* as unjustifiable as the affirmation of what is known to be positively false." (Italics ours.)

Can it be doubted that if a jeweler innocently misrepresents a watch-case to be solid gold, 18 karat fine, when as a matter of fact it is only gold-filled, or 14 karat fine, the purchaser may, on discovery of the fact, recover the money paid for the watch in an action at law even if the jeweler, to acquit himself of the charge of deliberate misrepresentation, showed that the watch was sent to him by a reputable manufacturer as of the quality represented?

Unfortunately, ill considered expressions are to be found in some cases to the effect that in law the complaining party must prove not only the falsity of the

statements but that the party making them had knowledge of their falsity and that in equity the last element is immaterial. The answer to the apparent conflict in the cases is this: If a man makes representations of fact as regards a matter about which he has knowledge, or about which he is *presumed* to have knowledge, as when a man is "talking up" a piece of property of his, and describes its qualities and characteristics, and it appears that these representations were untrue, the contract will be rescinded in a court of equity, or the maker of the representations will be compelled, in a Court of law, to refund the consideration that he received as a result of the misrepresentations, regardless of whether he knew them to be false or not. But, on the other hand, when the misrepresentation consists of *an answer given in response to a question* and it is plain to be seen that the question is intended to elicit *the information that the party has* upon the subject, or an opinion, and nothing else, if the answer is given honestly and in good faith, he cannot be held for the incorrectness of the answer unless he makes his answer a warranty. When an insurance company, in its printed inquiries contained in the application, asks the applicant, for instance, whether he has cancer, the question can't be understood in any other way than to mean: "Have you cancer, to your knowledge, or in your opinion?" We all know that the disease is an insidious one and a person having it may not suspect it until it is in an advanced stage. The insurance company certainly cannot be heard to say that it meant and expected to get an answer "Yes" from a man who did not suspect that he had cancer. It was in recognition of this prin-

ciple that there was inserted in the policy the provision cited above: "All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

While the exact question that was put to the defendant in the case of Southern Development vs. Silva, *supra,* was in dispute, yet the essence of it related to the extent of the work that had been done in the mine (p. 257), and when the intending purchaser asked the seller as to that, he must also be understood to have been inquiring as to the extent of the work done in the mine *according to the seller's knowledge.* He would have been foolish to expect the seller to tell him of any work done in the mine of which the seller was ignorant. If the matter was sufficiently material to the purchaser, he could by agreement, have made the answer a warranty. And as this was not done, the Court held in that case that even though the representation was untrue, since it was not shown that the seller knew it was untrue, the contract would not be rescinded on that ground. The fine illuminating opinion of Judge Hook in Kimber vs. Young, 137 Fed. 744 (C. C. A. 8th Cir.) will help to clear away the confusion. The cases merely hold that the action for *deceit* at common law is founded upon fraud and that the scienter must be proved. And it is equally necessary to prove deceit,—fraud,—of which the scienter is an indispensable ingredient, in a bill of equity, if deceit or fraud is therein charged. The Kimber case shows many instances of charges of fraud and deceit where the representation, upon a careful examination, proved to be only the expression of an opinion and not a representation of an alleged fact.

2. Respondent says (Mem. for Resp. 5):

> "The petitioner is not the only person having an interest in the policy sued on, as stated in her brief. If the policy of insurance, which is the subject of the litigation, was procured by fraud, the premiums paid by the decedent would be legally refundable to his estate and not to the beneficiary, the petitioner. The executors of Max Enelow Estate are Anna Katz and Meyer Enelow. These persons are not parties to the present suit. That the petitioner is not the only person with an interest in the subject-matter follows as a matter of law and therefore that legal conclusion need not be pleaded."

Respondent then cites a case to establish the proposition that the remedy at law "must be in all respects equal to that in equity in order to oust the latter of jurisdiction." In other words, the respondent hints that equity, or what amounts to the same thing, the trial of this issue before a chancellor according to equitable principles, can give respondent more complete relief than a Court of law can give it. The above seems to be predicated upon the hope that this Court will overlook the fact that the executors, if they have any interest,—and they have not,—*are not parties to the controversy that would be heard by the chancellor* any more than they are to the law suit? A decree of a chancellor in this case would be no more binding upon the executors than a judgment in the action at law

There is nothing in this contention from any aspect. Hundreds of cases have been defended by insurance companies on the ground of fraud. They asserted their defense and the Courts sustained them, or did not sustain them. In those cases where they were sus-

tained, and where it was held that the policies were procured by fraudulent misrepresentations, no one, we believe, raised the point that the executors of the assured could then bring a suit. For what? For the amount of the policy? The executors were not the beneficiaries. And if there is a question as to who is entitled to the few dollars of premiums which they tendered, why did the respondent in this case tender it to the petitioner, the beneficiary? (Aff. Def, Par. 16, R. 31). If this point is a good one, it should have been raised in the case of Pheonix Mutual Life Insurance Co. v. Bailey, 80 U. S. 616, as a separate ground for equitable jurisdiction over the bill to cancel.

Respondent says in its memorandum (p. 3): "There was no provision in the law when those cases (Phoenix Mutual, *supra,* Cable, *supra,* Buzzard vs. Houston, 119 U. S. 347, and Hipp vs. Baben, 19 How. 271) were decided for the introduction of equitable defenses in actions at law". Does respondent mean to contend by this that if A brought a suit at law against B to recover the price of a mine which he sold to B, and the latter defended on the ground that he was induced to buy it by false and fraudulent representations made by A, that such defense could not be heard, and that judgment must go for the plaintiff regardless of the defense? Or does he mean that such an extraordinary situation would have resulted if the suit were brought in a Federal Court prior to the enactment of Section 274 (b) of the Judicial Code?

Respondent realized that the burden was upon it to show that it was without adequate remedy at law.

The only things it could offer were the alleged difference in the degree of proof required to establish fraud in a Court of equity and the statement that the executors of the assured were not parties to the suit, apparently being willing to overlook the facts that by its policy and affidavit of defense it was required to prove knowledge of falsity, that the executors were not parties to the controversy to be heard by the chancellor, either, and that respondent had tendered a refund of the premium to *petitioner*.

Respondent's inability to offer any better reasons demonstrates the impropriety of making use of Sec. 274 (b) of the Judicial Code to deny to petitioner the constitutional right of trial by jury.

Respectfully submitted,

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